In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-689

VINCENZO BURRAFATO, ET UX., PETITIONERS

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that Vincenzo Burrafato's application for an immigrant visa was improperly denied.

Vincenzo Burrafato is a native and citizen of Italy. In 1961 he was married in Italy to Antonina Burrafato, a United States citizen. They are the parents of two children both of whom were born in Italy. In February 1970, Vincenzo Burrafato applied to the United States Consul in Palermo, Italy, for an immigrant visa to enter this country. Without waiting to learn whether his application would be granted, he entered the United States illegally on February 17, 1970. His visa application was subsequently denied by the United States Consul in Palermo and, upon review, the Visa Office of the United

States Department of State refused to overturn that decision (Pet. App. A-2 through A-3).[1]

On December 7, 1972, Mr. Burrafato was served with an order to show cause why he should not be deported. At the deportation hearing, he admitted that he had entered the United States illegally. He was therefore found to be deportable under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1) (Pet. App. A-3).[2]

On June 4, 1974 — after Mr. Burrafato had been served with the order to show cause, but before the immigration judge had issued his decision — petitioners filed the present action. Their principal contentions were that Antonina Burrafato's rights, as a United States citizen, to due process and equal protection of the law and Vincenzo Burrafato's right to due process had been violated by the denial of the latter's visa application without a statement of reasons. They sought declaratory and injunctive relief, including a declaration that Mr. Burrafato shall be "deemed a lawful citizen of the United States" (Pet App. A-9).

On January 20, 1975, the District Court for the Eastern District of New York dismissed petitioners' complaint for lack of subject matter jurisdiction (Pet. App. A-8

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[1]In denying the application, the United States Consul in Palermo stated that Mr. Burrafato was ineligible to receive an immigrant visa under Section 212(a) of the Immigration and Nationality Act, 66 Stat. 182, as amended, 8 U.S.C. 1182(a) (Pet. App. A-3). Upon review, the Visa Office of the United States Department of State concluded that "no facts [had been] disclosed which would warrant a reversal of the original finding of ineligibility under [the Act]" (*id.* at A-17).

[2]Petitioners have not claimed that the proceedings leading to the finding of Vincenzo Burrafato's deportability were lacking in due process.

through A-11). The court of appeals affirmed (*id.* at A-1 through A-7).

Petitioners have not in this proceeding attempted to disavow Vincenzo Burrafato's admission that he entered this country illegally and they have not challenged the correctness of the immigration judge's finding that he is deportable (Pet. App. A-3). None of the contentions made here by petitioners would entitle Mr. Burrafato to an immigrant visa or make his presence here legal. Rather, if petitioners' contentions were accepted, Mr. Burrafato would be entitled only to a statement of reasons why his visa application was denied.

Petitioners were given such a statement of reasons during this litigation.[3] Although Mr. Burrafato has not attempted to submit evidence refuting the factual basis of the reasons given him for the denial of his visa application, as he is entitled to do under 22 C.F.R. 42.130 (a), the decisions below do not preclude him from doing so. Indeed, Mr. Burrafato remains free to submit evidence in support of his visa application to the United States Consul in Palermo or to file a new application after he returns to Italy — where he would be but for his unlawful

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[3]Although Mr. Burrafato was not informed by the United States Consul in Palermo at the time the decision was made denying his application for an immigrant visa of the reasons for that decision, as required by 22 C.F.R. 42.130(a), while this action was pending in the district court petitioners were formally apprised that the application had been denied because of his "association with [an] organized criminal society" in Italy and that he was therefore excludable under Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(27) (Pet. App. A-5 n. 3). Section 212(a)(27) encompasses generally any person whose entry into the United States might present a threat "to the public interest, * * * welfare, safety, or security of the United States * * *." The Department of State and the United States Consul in Palermo correctly concluded that Section 212(a)(27) requires the exclusion of persons with ties to criminal organizations in their native countries.

entry into the United States. Since petitioners have received all the relief to which they are entitled,[4] there is no reason for this Court to grant their petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[4]Petitioners are not entitled to a separate statement of reasons from the State Department. The regulation relied upon by petitioners in support of their argument that the Department failed to follow established procedures in dealing with Mr. Burrafato's visa application (22 C.F.R. 42.130) provides in essence that the State Department may review the decision of a consular officer denying an application for an immigrant visa and furnish an advisory opinion to such officer. The opinion is binding on the consular officer only insofar as it concerns "an interpretation of law, as distinguished from an application of the law to the facts" of a particular case. 22 C.F.R. 42.130(c). The Department is not obligated by statute or regulation to review the denial of a visa application in any given case, or class of cases. Nor is it required to furnish reasons for refusing review in a given case or for refusing, upon review, to overturn the decision of a consular officer.